Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NORMAN A. JOHNSON,
PETITIONER,
v.

MERIT SYSTEMS PROTECTION BOARD,

On Petition for a Writ of Certiorari
from a decision of the United States
Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES OF AMERICA
OFFICE OF THE SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

QUESTIONS PRESENTED

1. Whether the Merit Systems Protection Board properly applied the doctrine of res judicata below where the prior case was factually distinct from the instant appeal?

2. Whether the Board properly declined jurisdiction over Petitioner's claim where Petitioner is a Preference Eligible Veteran who had suffered an improper restoration to the level of WG-2 after previously having attained federal employment at level 5, step 12?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NORMAN A. JOHNSON
PETITIONER
v.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI FROM A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Norman A. Johnson, proceeding in this matter pro se, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit (App., *infra*, 1a-2a) is unreported. The decision of the United States of America Merit Systems Protection Board (App., *infra*, 3a-4a) is reported at 51 MSPR 287 (1991). The decision of the United States of America Merit Systems Protection Board's New York Regional Office (App., *infra*, 5a-10a) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was entered on March 14, 1994. The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevent part: "nor shall (any person) be deprived of life, liberty, or property, without due process of law"

STATEMENT

The New York Regional Office of the Merit Systems Protection Board (hereinafter "the Board) improperly dismissed Petitioner's appeal on the grounds of res judicata and lack of jurisdiction. (App., *infra*, 5a-10a). The Board then denied the petition to review the initial decision. (App., *infra*, 3a-4a). Because the Board failed to hear the appeal below, Petitioner's right to due process was violated. Additionally, because other employees similarly situated to Petitioner may suffer comperable violations, this issue is sufficiently compelling to justify this court granting a writ of certiorari.

Background.

On October 31, 1970, Petitioner, a United States Postal Service employee, suffered an injury due to a mail truck accident. He received benefits from the Office of Workers Compensation Program (hereinafter "OWCP") intermitently until March of 1978, when he was forced to file for retirement. On October 17, 1980, the Postal Service removed Petitioner due to total disability. He received a disability retirement annuity from the Office of Personnel Management (hereinafter "OPM"). On December 30, 1980, OWCP denied Petitioner's benefits.

On June 26, 1984, an examination of Petitioner indicated he was no longer totally disabled. Therefore, the disability annuity was scheduled to terminate in one year. Petitioner then applied to the Postal Service for reinstatement to his former post of special delivery messenger, but his application was denied. He then appealed the denial of reinstatement to the Board, which dismissed his appeal for lack of jurisdiction. This decision was affirmed by the United States Court of Appeals for the Federal Circuit.

On February 10, 1991, the Department of the Interior (hereinafter "DOI") appointed Petitioner to the position of a WG-2,

step 1 laborer under a temporary appointment pending establishment of a register (TAPER). Mr. Johnson soonafter filed an appeal with the Board, claiming that the agency should have reinstated him to grade 5, step 12, which was his prior pay level, and should further have granted him restoration rights. On September 6, 1991, the Board dismissed the appeal for lack of jurisdiction (App., *infra*, 1b-3b), ruling *inter alia* that Mr. Johnson was not an employee for purposes of bringing an action because he was only a temporary appointment and had not served for the necessary one year.

On October 16, 1991, Petitioner pursued his claim by filing a complaint of a prohibited personnel practice with the Office of the Special Counsel. On January 26, 1992, OPM took displacement action, defining Mr. Johnson as an employee and reclassifying his position upward.

On February 9, 1992, DOI removed Petitioner from his position. The Board found it had jurisdiction over the appeal and ruled that the removal was procedurally improper. As a result, DOI was ordered to make reparations of back-pay plus interest. The matter was remanded to the New York Regional Office.

On June 15, 1993, Mr. Johnson, who was now eligible to

invoke the jurisdiction of the agency, filed an appeal with the Board, claiming he was improperly restored to the position of a WG-3 laborer. One month later, the New York Regional Office of the Board errently dismissed the appeal (App., *infra*, 5a-10a) on the grounds that it was precluded as res judicata because the Board had already decided the issue in its September 6, 1991 decision. The Board's initial decision became final on September 30, 1993 (App., *infra*, 3a-4a) and was later affirmed by the United States Court of Appeals for the Federal Circuit (App., *infra*, 1a-2a).

REASONS FOR GRANTING THE PETITION

The rulings below, denying Petitioner's appeal on the grounds of res judicata and lack of jurisdiction, are in error and present important issues to this court regarding the integrity of the administrative system. The instant claim is not precluded by res judicata because there are factual distinctions between the two cases. Additionally, the Board had jurisdiction over this matter because Petitioner is a Preference Eligibile Veteran (PEV) who had suffered a reduction in pay to a degree which gives the Board specific jurisdiction over the claim. Furthermore, the Board has jurisdiction over this matter because it involves the adversarial

action of an improper restoration, rather than a failure to reinstate.

A. THE BOARD'S SEPTEMBER 6, 1991 DECISION IS NOT RES JUDICATA OF THE PRESENT CASE BECAUSE IMPORTANT FACTUAL DISTINCTIONS EXIST

While the doctrine of res judicata applies to Board appeals, see Spears v. Merit Systems Protection Board, 766 F.2d 520 (Fed.Cir. 1985), issue preclusion is inapplicable where, as here, the prior proceeding involves a different factual setting than that of the present. Therefore, the Board erred when it dismissed the instant matter.

Generally, the principle of res judicata properly applies only where (a) the issue previously adjudicated is identical with that presented, (b) the issue was actually litigated in the prior appeal, (c) the previous determination of the issue was necessary to the final determination of the prior appeal, and (d) the party precluded was fully represented in the prior appeal. See Thomas v. General Services Administration, 794 F.2d 661 (Fed.Cir 1986). In this case, the issues are whether Petitioner, who is a preference eligible veteran with extensive civil service experience, was improperly restored to a level of WG-3, step 2 after previously being employed at level 5, step 12; and whether the Board had jurisdiction over this matter.

The first of these two issues was never addressed. The second, while it was addressed in a prior proceeding, was before the court in a vastly different factual context than in the instant case.

In the 1991 decision, Administrative Law Judge Arthur Joseph ruled *inter alia* that Petitioner lacked jurisdiction because as a temporary appointment with less than one year's service, he was not empowered to challenge his appointment. In the present case, Mr. Johnson was no longer a TAPER, but a full employee. Therefore, the previous case is factually distinct from the instant one, and should not preclude the Board from ruling on this issue. Additionally, the distinction between Mr. Johnson's standing as an employee in the two cases caused the issue of jurisdiction to be insufficiently litigated in the prior case. For these reasons, the Board erred in precluding the instant appeal on the grounds of res judicata.

B. BECAUSE PETITIONER IS A PREFERENCE ELIGIBLE VETERAN WHO HAS SUFFERED A DRASTIC REDUCTION IN PAY, THE BOARD ERRED IN RULING IT LACKED JURISDICTION OVER THIS MATTER

It is undisputed that Petitioner is a preference eligible veteran.

It is also undisputed that Petitioner once held federal employment at level 5, step 12, and was restored at merely WG-2, step 1 under a TAPER, suffering a reduction in pay. The Board has statutory jurisdiction over issues of this manner, and its failure to properly invoke its jurisdiction in this case constituted error. See 5 U.S.C.A. 7511(2)(1)(b) and 7701(2).

Admitedly, the jurisdiction of the Board is not plenary, but is "limited to those areas specifically granted by statute or regulation." See Antolin v. Department of Justice, 895 F.2d 1395 (Fed.Cir. 1989) However, in those instances, such as this, where a rule or regulation grants an employee the right to invoke the Board's jurisdiction, it is surely error and a violation of due process for the Board to nonetheless refuse to hear the issue. In the present case, Petitioner's status as a veteran and the reduction in pay he suffered as a result of the improper restoration combine to give the Board a specific grant of jurisdiction, pursuant to 5 U.S.C.A. 7511(2)(1)(b) and 7701 (2). Therefore, the Board's decision below is in error.

C. BECAUSE PETITIONER'S CLAIM WAS ONE OF IMPROPER RESTORATION, RATHER THAN A FAILURE TO REINSTATE, THE BOARD'S RULING THAT IT LACKED JURISDICTION OF THIS MATTER IS IN ERROR

The Board misunderstood Petitioner's claim and therefore committed clear error in denying jurisdiction over this matter. Contrary to the Board's ruling, the Petitioner did not allege that the agency failed to reinstate him. Rather, he claimed that the agency failed to reinstate him to a proper position because it failed to credit his previously earned step increases from his employment at which he attained civil service status at a level 5, step 12.

Petitioner's claim involves an adverse action of improper restoration which is clearly within the purview of the Board's jurisdiction. As a result of the Board's improper action in denying an adaquate review of this matter, Petitioner has suffered Administrative injury in the amount of $300,000 because his right to compensation was denied and because OPM's calculation does not include more than 700 hours of leave without pay.

CONCLUSION

For the reasons set forth above, The Supreme Court of the United States is respectfully urged to grant the Petition for a Writ of Certiorari in this matter.

Dated: June 30, 1994
New York, New York

Norman A. Johnson
Petitioner Pro Se.

APPENDIX
(A1)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OR
JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: March 14, 1994

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Costs are taxed against the Petitioner(s) in favor or the Respondent(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

94-3020

NORMAN A. JOHNSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Judgment

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S) NY0353930370-I-1

This CAUSE having been heard and considered it is

ORDERED and ADJUDGED

Per Curiam (NIES, Chief Judge, PLAGER and CLEVENGER, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED MAR 14 1994

Francis X. Gindhart

Francis X Gindhart Clerk

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

MAR 14 1994

FRANCIS X. GINDHART
CLERK

APPENDIX
A4

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NORMAN A. JOHNSON, Appellant,	:	DOCKET NUMBER NY035930370-I-1
v.	:	
DEPARTMENT OF THE INTERIOR. Agency	:	DATE: SEP 30, 1993

ORDER

After full consideration, we Deny the appellant's petition for review of the initial decision issues on July 15, 1993, because it does not meet the criteria for review set forth at 5 C.F.R. 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. 1201.133(b).

APPENDIX
(A5)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

NORMAN A. JOHNSON, Appellant	:	DOCKET NUMBER NY0353930370-I-1
v.	:	
DEPARTMENT OF THE INTERIOR Agency.	:	DATE: JULY 15, 1993

Appellant, a laborer with the National Park Service, appealed his allegedly "improper restoration" in 1991 after his recovery from an alleged on the job injury. He contended that the agency failed to respond to his written request for proper reinstatement. He also claimed that the agency's action was based on race, national origin, and age discrimination as well as unspecified reprisal.

Because appellant failed to establish a factual dispute bearing on the jurisdictional issue, the hearing that appellant requested was not held. *See Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984)

For the reasons below, the appeal is DISMISSED.

BACKGROUND

In a prior appeal, appellant alleged that the agency failed to act on his written request for proper reinstatement and denied

him restoration rights under 5 C.F.R. 353.305 (1991) when he received a temporary appointment pending establishment of a register under 5 C.F.R. 316.201 (1991), effective February 10, 1991. An initial decision was issues dismissing that appeal for lack of jurisdiction. *Johnson v. Department of the Interior*, MSPB Docket No.NY3443910487-I-1, slip op. At 3 (Initial Decision, Sep 6, 1991). In that decision, I found that the Board lacked jurisdiction under 5 C.F.R. Part 353 because appellant failed to demonstrate that he had suffered a compensable injury as defined by 5 U.S.C. 8101(12) (1988), i.e., an injury for which he received Office of Workers' Compensation Program (OWCP) benefits. Id. At 2-3, citing *Johnson v. Merit Systems Protection Board*, 812 F.2d 705, 708-11 (Fed. Cir. 1987). Appellant filed a petition for review of that decision which the Board denied. *Johnson v. Department of the Interior*, 51 M.S.P.R. 287 (1991)(Table).

ANALYSIS AND FINDINGS

This appeal raises a question of whether appellant's appeal is precluded by res judicata. The doctrine of res judicata provides that matters that were settled in a prior appeal in which there has been a final decision are precluded from being brounght before the Board in a

subsequent appeal. *See Caple v. U.S. Postal Service*, 52 M.S.P.R. 262, 265 (1992). In a June 24, 1993 pleading in response to a show order, appellant argued that res judicata should not apply because the agency committed perjury in the prior appeal and the Board's final decision was incorrect in dismissing the appeal for lack of jurisdiction. Appeal File, Tab 4.

The doctrine of res judicata applies in this case to bar appellant from relitigating the prior appeal in the subject appeal. The prior appeal involved the same parties, raised the same matter, and the Board issued a final decision which resolved the same jurisdictional issue raised in the subject appeal. Here, appellant is seeking to relitigate the jurisdictional issue resolved in the prior appeal. It is well settled that the doctrine of res judicata (applies) to jurisdictional questions in Board proceedings. *See Caple*, 52 M.S.P.R. at 265-66. Accordingly, I find that appellant is precluded under the doctrine of res judicata from relitigating the jurisdictional issue in the current appeal.

Assuming arguendo that res judicata does not apply in this case, I find that appellant failed to establish that the Board has jurisdiction over his appeal. The Board's jurisdiction is not plenary, but is "limited to those areas specifically granted by statute or regu-

lation." *See Antolin v. Department of Justice*, 895 F.2d 1395, 1396 (Fed. Cir. 1989). In other words, an employee may appeal an agency action to the Board only if a law, rule, or regulation confers such a right on the employee. Id. An agency's failure to reinstate a former employee, standing alone, is not an action within the Board's appellate jurisdiction. *See Hipona v. Department of the Army*, 39 M. S.P.R. 522, 525 (1989). Appellant bears the burden of proving the Board's appellate jurisdiction over his appeal. 5 C.F.R. 1201.56(a)(2)(l)(1993).

In an acknowledgment order, appellant was advised of the jurisdictional issue and ordered to present argument and evidence proving that the Board has jurisdiction over his appeal. He was informed of the jurisdictional issue and that to be entitled to a hearing, he must raise a nonfrivolous claim of jurisdiction. In a written response, appellant maintained that the Board has jurisdiction because he was denied restoration rights under 5 C.F.R. Part 353.

Appellant did not, however, plead facts which, if true, would establish Board jurisdiction over his appeal. As previously noted, a denial or reinstatement rights, standing alone, is not an appealable action. *Hipona*, 39 M.S.P.R. at 525. His reliance on 5 C.F.R. Part 353 as a jurisdictional basis for his appeal is misplaced. In order for jurisdiction to attach under 5 C.F.R. Part 353, appellant must

demonstrate that he recovered from a compensable injury as defined by 5 U.S.C. 8101(12)(1988), which requires a showing that he received OWCP benefits. *Johnson*, 812 F.2d at 708-11. In *Johnson*, an appeal involving the same appellant, the United States Court of Appeals for the Federal Circuit expressly held that appellant was not entitled to restoration rights under C.F.R. Part 353, because he was awarded disability retirement benefits under the Civil Service Retirement Act, 5 U.S.C. 8331-48 (1988) but not under the Federal Employee Compensation Act, 5 U.S.C. 8101-93 (1988). Id. At 708-11. In the subject appeal, appellant failed to present argument or evidence showing that he was granted OWCP benefits. Thus, jurisdiction does not attach under 5 C.F.R. Part 353. Id. Appellant's claim that the agency committed prohibited personnel practices, such as prohibited discrimination and reprisal, does not confer jurisdiction over an otherwise nonappealable action. *See Cruz v. Department of the Navy*, 906 F.2d 689, 692 (Fed. Cir. 1990) (en banc); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) *aff'd sub nom. Wren v. Merit Systems Protection Board*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

In summary, I find that the Board lacks appellate jurisdiction over the appeal.

APPENDIX
(A10)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

NORMAN A. JOHNSON Appellant	: DOCKET NUMBER NY3443910487-I-1
v,	:
DEPARTMENT OF THE INTERIOR Agency	: DATE: SEPTEMBER 6, 1991

Appellant, a laborer with the National Park Service, filed an appeal with the Board's New York Regional Office challenging the agency's failure to respond to his written request for reinstatement to a "qualifying appointment." He alleged that the agency committed prohibited personnel practices and he requested a hearing. For the reasons below, the appeal is DISMISSED.

BACKGROUND

Appellant is currently employed under a temporary appointment pending establishment of a register (TAPER), which he received effective February 10, 1991, under 5 C.F.R. 316.201 (1991) Agency File, Tab 4. The agency has not denied that it failed to act on appellant's written reinstatement request. Id. At Tab 1.

ANALYSIS AND FINDINGS

This case presents a question of jurisdiction. The Board's

jurisdiction is not plenary, but is "limited to those areas specifically granted by statute or regulation." *See Antolin v. Department of Justice*, 895 F.2d 1395, 1396 (Fed. Cir. 1989). In other words, an employee may appeal an agency action to the Board only if a law, rule, or regulation confers such a right on the employee. Id. An agency's failure to reinstate a former employee, standing alone, is not an action within the Board's appellate jurisdiction. *See Hipona v. Department of the Army*, 39 M.S.P.R. 522, 525 (1989). Appellant bears the burden of proving the Board's appellate jurisdiction over his appeal. 5 C.F.R. 1201.56(1)(2)(I)(1991).

In an acknowledgment order, appellant was advised of the jurisdictional issue and ordered to present argument and evidence proving that the Board has jurisdiction over his appeal. He was informed of the jurisdictional issues and that to be entitled to a hearing, he must raise a nonfrivolous claim of jurisdiction. In a written response, appellant maintained that the Board had jurisdiction because he was denied restoration rights under 5 C.F.R. 353.305 as a TAPER employee. With his appeal, he submitted, *inter alia*, an April 2, 1985 decision from the Office of Personnel Management terminating his disability retirement because he had recovered from his disability.

Appellant failed to establish that the Board has jurisdiction over his appeal. As previously noted, a denial of reinstatement rights, standing alone, is not an appealable action. *Hipona*, 39 M. S.P.R. at 525. His reliance on 5 C.F.R. Part 353 as a jurisdictional basis for his appeal is misplaced. In order for jurisdiction to attach under C.F.R. Part 353, appellant must demonstrate that he recovered from a compensable injury, i.e., an injury for which he received Office of Worker's Compensation Program benefits, 5 U.S.C. 8101(12)(Supp. 1991); *Johnson v. Merit Systems Protection Board*, 812 F.2d 705, 708-11 (Fed. Cir. 1987). *See also White v. United States Postal Service*, 46 M.S.P.R. 48, 54 (1990). In *Johnson*, an appeal involving the same appellant, the United States Court of Appeals for the Federal Circuit expressly held that appellant was not entitled to restoration rights under 5 C.F.R. Part 353, because he was awarded disability retirement benefits under the Civil Service Retirement act, 5 U.S.C. 331-48 (Supp. 1991) but not under the Federal Employee Compensation Act, 5 U.S.C. 8101-93 (Supp. 1991). Id. at 708-11. In the subject appeal, appellant failed to present argument or evidence showing that he was granted OWCP benefits. Thus, jurisdiction does not attach under 5 C.F.R. Part 353.401 (1991). Id. Appellant's claim that

the agency committed prohibited personnel practices does not confer jurisdiction over an otherwise nonappealable action. *Wren v. Department of the Army*, 2 M.S.P.R. 1,2 (1980), *aff'd sub nom. Wren v. Merit Systems Protection Board*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

In summary, I find that the Board lacks appellate jurisdiction over the appeal.